

For Appellant: Alfons Castillo

For Respondent: H. Kent Holman
Counsel

This appeal is made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Alfons Castillo against a proposed assessment of personal income tax in the amount of \$1,185.00 and a civil fraud penalty of \$999.58 for the year 1987.

^{1/} Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The issues presented by this appeal are: (1) whether appellant has met his burden of proof to show respondent erred in its assessment of additional taxes; (2) whether respondent properly imposed the civil fraud penalty against appellant; and (3) whether it is appropriate to impose a penalty against appellant for prosecution of a frivolous appeal before this board.

Appellant was an equipment operator for the County of San Diego and lived in the San Diego area from at least 1982 through 1987. For 1987, appellant filed a nonresident return showing zero taxable income and claimed a refund in the amount of \$1,566. On the W-2 form he filed, he defaced the designations for wages with asterisks and showed zero taxable income. His W-2 form, as supplied by San Diego County, revealed \$27,770 in wages for 1987. At protest, appellant asserted tax protestor arguments familiar to this board, claiming, for example, that he: (1) was not a resident alien subject to taxation; (2) had no wages subject to withholding; (3) was a citizen of "the Republic of California"; and (4) was not connected with a trade or business in California subject to taxation. Respondent rejected appellant's assertions as groundless, imposed a civil fraud penalty for filing a false W-2 form, and advised appellant that the State Board of Equalization also imposed penalties for prosecution of frivolous appeals. This appeal timely followed.

The record also reflects that for tax years 1982 through 1986, appellant filed returns and amended returns showing no taxable income, and filed claims for refund to which he was not entitled. Appellant asserted variations of the above contentions which were rejected by respondent. In addition, appellant processed an appeal before this board from the rejection of his 1985 claim for refund. In that appeal we held that appellant had a tax liability for his California-source income regardless of his residency but noted that the facts available indicated he was a California resident.

We must sustain the FTB's assessment of additional tax against appellant. The FTB is mandated to examine returns and determine the correct amount of tax due. (Rev. & Tax. Code, § 18582.) When it determines the tax disclosed in the original return is less than the tax disclosed by its examination, then it has the authority to make an additional assessment. (Rev. & Tax. Code, § 18583.) The FTB's findings are presumed to be correct, and it is the taxpayer upon whom rests the burden of producing sufficient evidence to overcome this presumption of correctness. (Appeal of Harold and Lois Livingston, Cal. St. Bd. of Equal., Dec. 13, 1971; Appeal of Richard A. and Virginia R. Ewert, Cal. St. Bd. of Equal., Apr. 7, 1964.)

In the instant case, appellant has submitted no evidence to support his contentions other than his written declarations. Mere assertions, without additional credible evidence, are not enough to satisfy the taxpayer's burden to overcome the presumption of correctness which attaches to the FTB's determination. (Appeal of Peter F. and Betty H. Eastman, Cal. St. Bd. of Equal., May 4, 1978.) Appellant's tax protestor arguments are without merit and this board and the courts have on numerous occasions rejected them as groundless. (See Appeals of Fred R. Dauberger, et al., Cal. St. Bd. of Equal., Mar. 31, 1982, and cases cited therein.) Moreover, a review of the record reflects that the FTB's assessment, as based upon the original W-2 form, was accurate. Since appellant has not shown that the FTB assessment was incorrect, we must sustain the proposed assessment.

With respect to the civil fraud penalty, the burden of proof is different, for the burden is upon the FTB to prove, by clear and convincing evidence, that appellant has committed civil fraud. (Appeal of Barbara P. Hutchinson, Cal. St. Bd. of Equal., June 29, 1982; Appeal of George W. Fairchild, Cal. St. Bd. of Equal., Oct. 27, 1971; Appeal of Hubbard D. and Cleo M. Wickman, Cal. St. Bd. of Equal., Feb. 2, 1981.) Fraud implies bad faith, intentional wrongdoing, and a sinister motive, the taxpayer must have the specific intent to evade a tax believed to be owing. (Jones v. Commissioner, 259 F.2d 300 (5th Cir. 1958); Powell v. Granquist, 252 F.3d 56 (9th Cir. 1958).) Although fraud may be established by circumstantial evidence, it is never presumed or imputed, and it will not be sustained upon circumstances which at most create only a suspicion of fraud. (Jones v. Commissioner, supra; Valetti v. Commissioner 260 F.2d 185, (3d Cir. 1958); Appeal of George W. Fairchild, Cal. St. Bd. of Equal., supra.)

The FTB takes the position that appellant's five-year pattern and practice of filing inaccurate returns and unjustified claims for refund is evidence of a willful and knowing intent to understate his tax liability in 1987. We do not agree that appellant's prior activities, even assuming they were fraudulent, are sufficient to show that he had the required specific intent for civil fraud in 1987.

This board has only in limited circumstances upheld imposition of the civil fraud penalty and we have consistently held that proof of fraud in one year will not sustain the taxing authority's burden of proving fraud in another year. (Appeal of Robert V. Erilane, Cal. St. Bd. of Equal., Nov. 12, 1974; Appeal of Eli A. and Virginia W. Allec, Cal. St. Bd. of Equal., Jan. 7, 1975.) In both Erilane and Allec, we rejected such a use of a criminal conviction. If this board does not accept such bootstrapping with criminal convictions, we certainly will not do so where there has been no adjudication whatsoever of fraud in prior years. Accordingly, respondent's pattern and practice argument is rejected and imposition of the civil fraud penalty must be reversed.

We now turn to the question of whether it is appropriate to impose upon appellant a section 19414 penalty for prosecution of a frivolous appeal before this board. We have articulated in numerous decisions that we will not condone cases where the arguments made have been previously rejected, are groundless, or are prosecuted before this board merely to delay the payment of taxes. (See Appeals of Fred R. Dauberger, et al., supra; Appeals of Robert R. Aboltin, Jr., et. al., Cal. St. Bd. of Equal., June 29, 1982.)

For purposes of the frivolous appeal penalty we will take into consideration an appellant's pattern and practice of conduct in prior years. In the instant case, appellant has, for at least five consecutive years, filed returns, amended returns, and claims for refund which were inaccurate and based upon distortions of the law and meritless arguments. On more than one occasion now, he has forced years of extended appeals despite notice by respondent and this board that his positions were patently erroneous. Appellant's conduct reflects a flagrant disregard for the integrity of this board and the administrative appellate review process. He has abused the process and wasted the resources of the state agencies involved and, ultimately, of the people of the State of California. Appellant's conduct

is clearly grounds for imposition of the frivolous appeal penalty and, accordingly, we will impose a penalty in the amount of \$2,500.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Alfons Castillo against a proposed assessment of personal income tax in the amount of \$1,185 for the year 1987 is hereby sustained; the action of the Franchise Tax Board in imposing a civil fraud penalty in the amount of \$999.58 for the year 1987 is hereby reversed; and we hereby impose penalty in the amount of \$2,500 pursuant to Revenue and Taxation Code section 19414.

Done at Sacramento, California, this 30th day of July, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

Brad Sherman, Chairman

Ernest J. Dronenburg, Jr., Member

Windie Scott*, Member

_____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9
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